

Application No. 10 of 2006

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under section 56 of the Securities Ordinance, Cap. 333 and section 12 of the Leveraged Foreign Exchange Trading Ordinance, Cap.451

AND IN THE MATTER OF section 217 of the Securities and Futures Ordinance, Cap. 571

BETWEEN

HUNG HING CHUEN

Applicant

And

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: 24 August 2006

Date of Determination: 31 August 2006

DETERMINATION

The Application

1. This is an application for review by Mr Hung Hing Chuen against the decision of the Securities and Futures Commission dated 2 May 2006 to suspend his licence for a period of 6 weeks.

2. The applicant was first registered as a forex trader's representative in January 1996 and as a securities dealer's representative in May 1998. Mr Hung currently is accredited to Sincere Securities Limited ('Sincere') and Hong Kong Forex Investment Limited, and is licensed to carry on Type 1 (dealing in securities) and Type 3 (leveraged foreign exchange trading) regulated activities.

3. On 31 May 2005 the SFC sent a Letter of Mindedness to the applicant proposing to suspend his licence for a period of 3 months for breaching the account opening procedures of Sincere and paragraphs 5.1 (know your client) and 5.4 (client identity) of

the April 2001 Code of Conduct for Persons Registered with the SFC.

4. Mr Hung submitted his representations in response on 20 June 2005, and as a result, on 14 November 2005, the SFC issued a second Letter of Mindedness to Mr Hung proposing a reduction in the proposed penalty from 3 months to 6 weeks, having taken into account Mr Hung's clean record and his co-operation, together with the fact that he had made financial restoration to his employer of HK\$79,807 to repair the losses suffered as the result of the trades that had given rise to the disciplinary inquiry.

5. On 8 December 2005 Mr Hung submitted his second representations to the SFC, and on 2 May 2006 the SFC issued a Notice of Decision suspending the applicant's licence for a period of 6 weeks.

6. The applicant lodged his Notice of Application for Review on 22 May 2006, hence the necessity for this hearing and this Determination.

7. With the consent of the parties, this application has been heard by the Tribunal Chairman sitting alone, pursuant to the

provisions of section 31, Schedule 8, of the Securities and Futures Ordinance, Cap. 571.

The Factual Background

8. In December 2002 the SFC had received a complaint against an account executive of Taiwan Securities (HK) Ltd, which had alleged that in September 2002 this executive had had an arrangement with other brokers to push up the share price of a company known as New Chinese Medicine Holdings Ltd ('NCM')(stock code 8085).

9. NCM was an investment holding company engaged in research, development, marketing and distribution of Chinese Medicine. It was listed on the GEM Board on 7 March 2002 and its shares were offered at \$0.6 per share.

10. On 27 September 2002 trading in NCM shares was suspended pending an announcement relating to a proposed acquisition, the closing price of the shares prior to the suspension being \$1.17.

11. On 29 November 2002 NCM announced the proposed acquisition of 51% interest in one Sichuan Research Institute of New Medicine, and trading in NCM shares resumed, albeit its

share price plummeted from the pre-suspension figure of \$1.17 to \$0.27, a fall of almost 77%.

12. Consequent upon these events, in December 2002 the SFC commenced an investigation into suspected market manipulation of NCM shares during the month of September 2002, wherein it was found that during that month over 50% of the buy and sell orders for NCM shares were conducted by ten traders, with some of these traders being related to the brother of the then chairman of NCM.

13. In the course of the investigation, seven of these traders and ten account executives were interviewed, although ultimately no criminal prosecution was mounted by reason of insufficient evidence and the failure to locate the prime suspects, one of whom by then had been murdered.

14. However, even though no criminal prosecution transpired, some of the account executives who had handled the relevant NCM trades were considered to have been in breach of the Code of Conduct.

15. It was in this context, therefore, that the SFC commenced disciplinary action against the present applicant, Mr

Hung, which disciplinary action ultimately resulted in the penalty of 6 weeks suspension which Mr Hung now seeks to review.

Mr Hung's Involvement

16. Mr Hung informed the SFC that in mid-August 2002 an existing client, a Mr So Kin Chung, had told him that he was very busy and had requested that Mr So's friend, identified only as "James", be permitted to place stock orders on his behalf with Mr Hung.

17. Mr Hung agreed, and from mid-August 2002 onwards, it had been the said "James" who had placed orders for NCM shares with Mr Hung; apparently the situation that prevailed was that after the orders had been executed, Mr Hung would call "James" for confirmation, and he would also call So after market close to inform him about the trades. Two days after "James" had placed the last order, the trading in NCM shares was suspended, and, at the time of that suspension, "James" owed about \$130,000 to Sincere.

18. Mr Hung also told the SFC that about two weeks prior to the resumption of trading in NCM, on 29 November 2002 he had been called by a Miss Lau who had told him that So's account had been "borrowed" in order to trade the NCM shares, and that

the outstanding balance would be settled; the applicant later came to believe that this Miss Lau had been among those who had manipulated the NCM shares, and So later informed the applicant that Miss Lau was the contact person for a group of people responsible for trading the NCM shares.

19. In his interview with the SFC the applicant, Mr Hung, did not seek to cover up what had happened in this regard, and admitted that So was a 'walk in' client whom he had only met twice, that he did not know the nature of the relationship between So and "James" nor the full name or occupation of the latter, whom he had never met before, and that he was aware that as a matter of company policy that Sincere required written authorization signed by So authorizing "James" to place orders for his account.

20. Mr Hung in fact had reported to his supervisor at Sincere, Mr Louis Shum, to the effect that he had permitted this trading to occur in this manner, and Mr Hung had maintained that Mr Shum had found this acceptable, although in interviews with the SFC on 17 July and 25 August Mr Shum denied that this was the case.

21. Mr Hung also does not appear to have complied with Mr Shum's directions to retain a copy of the audio recording of the instructions from So and "James" because, he told the SFC, he "didn't think about it at that time".

22. It was against this backdrop that disciplinary proceedings were put in train, the culmination thereof being the suspension of Mr Hung's licence for a period of 6 weeks.

The Argument

23. There is little if any dispute as to the primary facts of this case, the thrust of this application for review being Mr Hung's request to this Tribunal for leniency. In effect, therefore, this was an application for review of sentence only.

24. He suggested that in the circumstances the penalty imposed upon him was excessive, and he argued that whilst he had been in the wrong, he had learned from his mistake and that he had taken steps further to educate himself as to his duties, and that the appropriate penalty should be a reprimand, or perhaps a suspension for 2 weeks.

25. Mr Hung stressed that he had openly admitted his misconduct, and suggested to the Tribunal that the SFC had not

considered the fact that he had taken the initiative and had reported these events to his supervisor, Mr Shum, and also that he had taken steps to make restitution of some HK\$79,807 to his employer to cover the loss accruing in So's account due the insufficiency of the relevant deposit and the huge drop in the price of the share on reopening.

26. Mr Hung emphasized that he had no motive for personal gain in doing what he had done, and he certainly had not been privy to any manipulation of the market in these NCM shares. He also complained of that which he perceived as disproportionate treatment between himself and other account executives who had been caught up in this share manipulation scheme.

27. For the SFC, Mr Chan submitted that the regulator had not failed to take into account the matters canvassed by Mr Hung. To the contrary, he said, the matters raised were precisely the reason that the original sentence of 3 months had been reduced to 6 weeks.

28. In this connection Mr Chan referred the Tribunal to the earlier case of *Kwok Wai Shun v SFC*, SFAT Application 3 of 2004, which, absent the mitigating factors which were to be found in the

present instance, was a similar case wherein the sentence of 3 months had been upheld.

29. Nor, said Mr Chan, had the SFC overlooked the fact that Mr Hung had had a clear record prior to this infraction, and that he had co-operated with the SFC, and had made financial repayment.

30. Mr Chan also submitted that it was unhelpful to make comparisons with other cases arising out of the same facts, and that these other cases to which Mr Hung had made reference were instances in which the brokers in question had accepted findings of the Commission and immediately had settled the cases against them, and had not, as in this case, insisted on taking out an application for review.

Decision

31. Notwithstanding the perseverance and persuasiveness with which Mr Hung invested his submission, this Tribunal is unable to accede to it.

32. The inescapable fact is that Mr Hung became caught up in market manipulation events because, and solely because, he permitted the rules to be broken in terms of allowing “James” to

use So's account absent written authorization from the latter, and absent permission so to do from his superiors.

33. As Mr Chan observed during argument, it was never the SFC's position that Mr Hung himself was part and parcel of the plan to manipulate the market in these shares, but the hard fact is that people who seek to manipulate markets generally do so by using nominee accounts, and the fact that Mr Hung was prepared to bend the rules to permit "James" to have access to So's account facilitated the market manipulation scheme which then was unfolding; in addition, on his own case Mr Hung never had taken steps to require "James" properly to identify himself, and had this occurred I accept Mr Chan's contention that such greatly would have assisted the ongoing SFC investigation.

34. For my part I can see no basis for interfering with the SFC's decision in this matter, and I do not accept Mr Hung's suggestion that the SFC had failed to take into account the various matters that he prayed in aid in his favour.

35. The short point is that Mr Hung regrettably made a mistake, which as it happened in this instance appears to have had the effect of facilitating the ongoing market manipulation of these shares. In my view in the circumstances of this case it cannot be

said, as Mr Hung has said in terms, that in coming to its view that the SFC has had “little regard for reasonableness”.

36. The SFC’s task is market regulation, and to ensure, as far as it reasonably and fairly may, that the necessary rules are adhered to – in this case the importance of client identification and proper third party authorization.

37. I am unable to see that in this instance the SFC was plainly wrong in taking the view that it has about Mr Hung, or that it has failed to take into account matters it should have considered, or, conversely, that it has taken into account matters that it should not.

38. In coming to the view that it has taken as to the appropriate punishment for Mr Hung, the SFC has not, as Mr Hung appears to think, arrived at the conclusion that the applicant is in any sense guilty of fraud or venality, or that he is a “bad” person. In my judgment the SFC in this case is simply, and in the circumstances justifiably, reacting to the undisputed facts, which disclose the error Mr Hung has made, and has sentenced accordingly, after specifically taking into account the clear mitigating factors present in this case.

39. It is no part of this Tribunal's function to act, in effect, as a 'secondary regulator' and to impose its independent judgment, untrammelled by daily knowledge of the market or market conditions, as to that which should be the "correct" sentence for an infraction such as Mr Hung has committed.

40. The SFC is the professional body established by law to regulate the market on a daily basis, using its professional expertise, and no cogent reason has been advanced by Mr Hung to justify the conclusion that something here has gone plainly wrong or that this Tribunal should interfere with the SFC's conclusion in this case.

41. As this Tribunal expressed the position two years ago in *Kwok Wai Shun v SFC, op cit, at para 23*, "absent clear error, it is no part of this tribunal's function to substitute another view for that of a regulator which, seized with all the relevant facts of a particular case, has exercised its professional judgment on the appropriate penalty for a particular market infraction occurring at a particular time."

42. If I may say so, those words remain as relevant today, and should be borne in mind by those considering an application to review an SFC disciplinary decision.

43. In my judgment the SFC is entitled to come to the view that it did in this case, and in so doing it is entitled, as Mr Chan suggested, to send the appropriate message to the market as to the sanction that is likely to be imposed in like instances whereby the relevant rules – which exist to protect the integrity of this market – have been bent or otherwise flouted.

44. I recognize, of course, that disciplinary sanction may have the effect of causing possible financial hardship, and indeed Mr Hung has prayed in aid the fact that his livelihood will be affected if this period of suspension is not reduced as he now requests. However, provided the disciplinary sanction in question is otherwise merited, as a matter of general principle resultant financial deprivation cannot in itself justify lack of imposition of the appropriate penalty.

45. Nor am I generally assisted by representations as to what may, or may not, have happened in other cases arising from the same facts; the detailed circumstances of these cases are not before me, and the result of such cases in very substantial part depends upon their own individual circumstances.

46. It follows from the foregoing that this Tribunal is disinclined to interfere with the penalty imposed in this case upon the applicant, Mr. Hung, and thus the decision of the SFC must stand.

Order

47. The Order of the Tribunal accordingly is as follows:

- (i) The application for review dated 22 May 2006 is dismissed.
- (ii) Absent agreement thereon, this Tribunal will entertain argument from the parties as to costs at a date and time to be appointed (estimated time: 1 hour).

Hon Mr Justice Stone
(Chairman)

Mr Hung Hing Chuen, Applicant, in person

Mr Jimmy Chan, of the SFC, for the Respondent